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IN THE

Supreme Court of the United States

ARCHDIOCESE OF MILWAUKEE,
Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA, ORANGE COUNTY
Respondent,
and

ERIC NATHAN PAINO,
Real Party-in-Interest

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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On Petition For Writ Of Certiorari
To The Court Of Appeal, State of California
Fourth Appellate District, Division Three

REAL PARTY-IN-INTEREST'S BRIEF IN OPPOSITION

Real Party-in-Interest Eric Nathan Paino respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Petitioner Archdiocese of Milwaukee,

seeking review of the California Court of Appeal's decision in this case. That opinion is reported at *Archdiocese of Milwaukee v. Superior Court of Orange County*, 112 Cal. App. 4th 423 (2003).

STATEMENT OF THE CASE

1. Introduction.

In 1976, the Roman Catholic Archdiocese of Milwaukee (the Milwaukee Archdiocese) purposefully transferred to California Father Siegfried Widera, a priest who had been criminally convicted of child molestations three years earlier. The reason why the Milwaukee Archdiocese wanted to move Father Widera into California was because it learned that the priest had molested again, and because of "legal technicalities," he needed to get out of the State of Wisconsin. The Archbishop of Milwaukee solicited and received the help of the Diocese of Orange (Orange Diocese) to get Father Widera out of Wisconsin, and into a new position as a California priest.

The intentional and completely reckless acts by these two dioceses had a devastating impact in California. Father Widera went on to molest numerous other Catholic boys in California, including Real Party-in-Interest Eric Nathan Paino.

Paino sued the Milwaukee Archdiocese in California for its complicity in intentionally transferring this known pedophile into California. The Milwaukee Archdiocese moved to quash the summons, arguing that the California courts could not exercise personal jurisdiction over it, and

therefore, the California courts could not hold the Milwaukee Archdiocese accountable for its actions.

Both the trial court and the Court of Appeal disagreed with the Milwaukee Archdiocese. In a published decision, the Court of Appeal held:

> The evidence showed the Milwaukee Archdiocese sought to rid itself of Widera by sending him into California knowing he was a pedophile and had been convicted in Wisconsin of sexual perversion against a boy. Paino met his burden of proving, for purposes of establishing specific personal jurisdiction, the Milwaukee Archdiocese engaged in intentional conduct expressly aimed at California and knew its conduct would cause harm in this state. We therefore deny the Milwaukee Archdiocese's petition for writ of mandate challenging the order denying the Milwaukee Archdiocese's motion to quash service of summons.

Archdiocese of Milwaukee v. Superior Court of Orange County, 112 Cal. App. 4th 423, 426 (2003). The California Supreme Court denied the Archdiocese's petition for review. The Milwaukee then filed this Petition for Writ of Certiorari.

2. Factual Background.

Throughout its Petition for Writ of Certiorari, the Milwaukee Archdiocese continues to try to dispute the Court of Appeal's factual conclusions as to what really happened

when Father Widera was transferred into California. The Milwaukee Archdiocese tries to argue that Father Widera just decided go to California on his own to visit his family, that the Archdiocese just innocently acquiesced to his traveling to California, and that the only thing the Archdiocese did was fail to prevent Father Widera from working in California. As seen by the Court of Appeal's decision, nothing is further from the truth. Here are the factual conclusions made by the Court of Appeal in deciding the personal jurisdiction issue.

A. Father Widera Is Convicted of Child Molestations in Wisconsin.

Father Widera was ordained and incardinated into the Milwaukee Archdiocese in 1967. *Archdiocese of Milwaukee,* 112 Cal. App. 4th at 427. On July 2, 1973, a criminal complaint for sexual perversion was filed against Widera. The complaint alleged:

> Frank Siegfried Widera, _____ and _____ [minor boys' names omitted in original] went from Port Washington to Random Lake . . . and in the course of traveling to Random Lake . . . _____ [minor boy's name omitted in original] placed his mouth over the penis of Frank Siegfried Widera.

Id. At the time of his arrest, Widera had been serving as a priest at St. Mary's in Port Washington, Wisconsin. *Id.* Less than one month after Widera's arrest, on July 31, 1973, the Archbishop of the Milwaukee Archdiocese, William E. Cousins, ordered the immediate transfer of Widera from St.

Mary's. *Id.* Two weeks later, on August 13, 1973, Widera pled guilty and was sentenced to three years' probation. *Id.* The following day, on August 14, 1973, a document from the Archdiocesan Personnel Board (the board which assisted the Archbishop and offered recommendations regarding priest placement) stated:

> Communication from Archbishop Cousins to J. Theisen, Exec. Sec. of Priests' Personnel Board . . . Father Widera was arrested for, as the Milwaukee Sentinel stated it, sexual perversion with young boys. He appeared in the Ozaukee County Court yesterday, August 13, 1973 and was sentenced to 3 years probation. The Judge, who imposed the sentence, also ordered that Father Widera may not return to the Port Washington area. Father Widera is presently seeing Dr. Leo Graham twice per week.

Id. at 427.

B. Other Incidents of Child Molestations by Widera In Wisconsin.

The Milwaukee Archdiocese knew that the child molestation resulting in Widera's conviction was not an isolated incident. *Id.* In early September 1973, Father Rolland Glass, the pastor at St. Mary's, discussed Father Widera with Father Paul Esser. Esser's memorandum of the interview stated:

> [Widera] was a 'loner.' He had difficulty relating with adults. He had instant rapport with young boys and spent a lot of time with them. . . [¶] A male grade school teacher saw Fr. Widera fooling around with the boys of another teacher. He said to Father that if he fooled around in the same way with his students, he would punch Father in the face. [¶] Fr. Glass had reports for some time from within and without the parish that something was wrong. [¶] He coached the boys in basketball. He would be in the shower with the boys – all in the nude. When an adult male entered the shower, Fr. [Widera] covered himself with a towel . . . [¶] Parishioners came forward after the fact and indicated incidents they had noticed and warnings they had given their own children about not letting Father touch them. [¶] Fr. Glass' mother told Glass that Fr. [Widera] on at least one occasion had a boy sleep with him overnight in the rectory. [¶] Fr. Glass did confront Fr. [Widera]: 'Circumstances are forcing me to draw certain conclusions about you and your conduct with little boys.' [¶] Fr. [Widera] stopped seeing boys for a time but then went back to it. There was a pattern of contact with small bo[ys].

Id. at 427-28.

In September 1973, while on probation for the criminal conviction, Widera was transferred to St. Andrews

in Delavan, Wisconsin. *Id.* at 428. Widera was allowed to work with children there, and in a matter of months after the criminal conviction, letters were written by the St. Andrews school board and St. Andrews parishioners to the Milwaukee Archdiocese, praising Father Widera's abilities with children. *Id.* The Milwaukee Archdiocese responded to each of these letters, but did not disclose Widera's conviction or other reports of possible child molestations. *Id.*

On June 29, 1976, more allegations were made against Widera. The Milwaukee Archdiocese's ombudsmen's notes of June 29, 1976 state:

> Archbishop called – Mike Short, a therapist in Elkhorn, had called in to Bob Sampon - Short is a counselor and now advocate for [redacted text]. She reported to Short that her son had been sexually molested by Fr. Widera while on a weekend fishing outing - Son is [redacted name] age 13, an altar boy at Parish. Archbishop suggested I call Widera first, then Short, assuring complainants that W. will be removed from Parish and will receive in-patient treatment, if necessary.

Id. at 428-29. The ombudsman's July notes contain Widera's admission that he made "a slip." *Id.* at 429. The ombudsman told Father Widera that he would "try to keep the lid on the thing, so no police record would be made," but advised him that he would probably would be transferred and would require in-patient treatment. *Id.* The ombudsman then contacted Short, who indicated he would contact the victim's mother and "convince her not to act with police, if Church

removes W. from parish, and gets him help, as well as counsels the boy." *Id.* The ombudsman also advised Widera he would be transferred from St. Andrews at the conclusion of his probation, and told Widera to stay away from several other boys Father Widera had been seen with. *Id.*

On August 20, 1976, Father Eugene B. Henke, pastor of St. Andrews, reported an allegation regarding Widera to the Archdiocesan Personnel Board. The Archdiocesan Personnel Board notes state: "8/20/76 - telephone - E. Henke - informed that S. Widera has had an incident with an 11 year old boy a couple of months ago." *Id.* It was not clear whether the allegations reported by Henke were the same as those reported to the ombudsman by Short. *Id.*

C. Widera Goes "On Vacation" To California And Takes Faculties In Orange.

On the same day, August 20, 1976, the ombudsman spoke with both Widera and Henke. The ombudsman wrote "Called Henke and Widera - they agreed that W. would go 'on vacation' (California!) ...[Widera] would be transferred. W. should tell people only that he's going on vacation." *Id.* On August 23, 1976, the ombudsman informed Archbishop Cousins of the "developments," and Widera soon left for California. *Id.* On August 27, 1976, the ombudsman wrote:

> Approached Esser about above – the Personnel Board has heard nothing from anyone - Archbishop has *not* spoken to Personnel Board about this matter. – However, Paul [Esser] would have a problem

> in conscience to re-assign Siegfried - when? And should they really - in view of Widera's record???

Id. at 429-30. On October 29, 1976, John Waldbauer, the executive secretary of the Archdiocesan Personnel Board sent Widera a letter, stating:

> The Personnel Board recommends a choice. First, that you pursue significant counseling to assist you in coming in touch with yourself about the action that has brought about a hasty exit from your last two assignments. . . Subsequent to such therapy, you would be considered for an appointment within the Archdiocese. The alternative would be for you to be released to the services of another diocese; with the permission of the Archbishop, you would request to minister elsewhere. Should you select the second alternative, the Board would ask periodic reports about your status.

Id. at 430. On December 3, 1976, Archbishop Cousins told the Archdiocesan Personnel Board that "S. Widera–will spend some time with his parents in Florida and then go to California to continue psychotherapy" and that Cousins "plans to contact Bishop Johnson of Orange to see if there might be something available for Widera." *Id.* Cousins' authorization was necessary for Widera to work as a priest outside of the Milwaukee Archdiocese. *Id.* On December 17, 1976, Cousins told the board that he had "called Bishop Johnson in Orange about possibility for S. Widera." *Id.*

On December 20, 1976, Cousins sent a letter to the bishop of the Orange Diocese, Bishop William Johnson, and the Chancellor/Secretary of the Orange Diocese, Father Michael Driscoll:

> A few days ago I talked by phone to Bishop Johnson about a possible pastoral assignment for Father Siegfried Widera of this Archdiocese. The conversation was very general and the Bishop suggested that perhaps something could be done on a temporary basis. My reason for approaching Bishop Johnson is founded in the fact that Father Widera's brother and family live in Costa Mesa, California. . . .
>
> Father Widera was ordained in 1967 and has done good work for the Diocese in the places to which he was assigned. In his earlier years there was a moral problem having to do with a boy in school. This seemed adequately confronted through treatment and an intense desire upon Father's part to avoid any repetition of a previous offense.
>
> More recently, however, there has been a repetition, and according to our State Laws further psychiatric treatment is mandated with the strong recommendation that no immediate assignment be made in the environs of the Archdiocese.

> Father Widera has cooperated in every way and is presently under treatment. His doctor is somewhat in favor of his leaving the scene but expects that there will be continuing treatment. This has already been arranged and a doctor in California will take over at this point. From all the professional information I can gather there would seem no great risk in allowing this man to return to pastoral work, but there are legal complications at present writing. Incidentally, these legal technicalities would permit Father's going to another State as long as treatment is continued. . . .
>
> There is no thought of incardination involved, and I am quite willing to accept the man back into the Archdiocese whenever circumstances would indicate. Though I anticipate no recurrence of this past aberration, I would certainly want to be informed if the slightest suspicion were to develop. I would like to show fraternal charity to a fellow priest but I cannot be virtuous at the expense of a fellow bishop.

Id. at 430-31. On January 10, 1977, Widera was appointed as an associate pastor at St. Pius V Parish in Orange County, California. *Id.* at 431. On January 25, 1977, Archbishop Cousins sent a letter to Father Widera, confirming his temporary assignment in California:

> According to our earlier conversations, your stay in California will be determined by the

> doctor recommended to you before your departure and to whom I confidently trust you have committed yourself for necessary help. Treatment is important to you and essential to your future assignment, but I have every reason to believe that you will accept this condition and work towards an early return.

Id. The same day, Archbishop Cousins also sent a letter to Bishop Johnson, confirming that Father Widera would remain a member of the Milwaukee Archdiocese and stating:

> Permit me to express my sincere thanks to you and those involved for this consideration of a priest who has done good work and whose absence from the Diocese is predicated upon the local situation discussed in earlier letters. I fully expect that upon the recommendation of those professionally helping him at the present time he will be reassigned in our Archdiocese.

Id. During the period in which Widera worked in California but was incardinated in Wisconsin, he remained subject to the jurisdiction, authority, and control of the Archbishop of Milwaukee. The Archbishop of Milwaukee had the authority to recall Widera to Wisconsin, to remove his faculties as a priest, to investigate whether he had committed acts of molestation, and to petition the Pope to laicize him. *Id.* at 432.

D. Widera Is Excardinated From the Milwaukee Archdiocese And Incardinated In The Orange Diocese.

In late 1981, Widera sought incardination into the Orange Diocese. *Id.* Letters were written back and forth regarding Widera's excardination from the Milwaukee Archdiocese and incardination to the Orange Diocese. *Id.* None of the correspondence from the Milwaukee Archdiocese mentioned Widera's criminal conviction. *Id.* at 433. Widera's decree of incardination in the Orange Diocese stated the diocese was "officially advised that you [Widera] have [received] a decree of excardination from the Archdiocese of Milwaukee *with assurance of your good character, your course of studies and your good example.*" *Id.* (italics in original).

In July 1985, Widera was transferred to St. Martin de Porres in Yorba Linda. Shortly thereafter, Widera started sexually molesting Paino, an eight-year old boy who attended St. Martin. *Id.*

3. Proceedings Below.

Paino sued the Milwaukee Archdiocese in California for its complicity in intentionally transferring this known pedophile into California. On a motion to quash the service of the complaint filed by the Milwaukee Archdiocese, the trial court held that "the evidence is certainly sufficient to show that the Archdiocese of Milwaukee chose to place this troublesome member of its clergy here in California as a sort of lend-lease program with the hope that he would be out of their sight and out of their jurisdiction." *Id.* at 438. The trial

court denied the motion. The Milwaukee Archdiocese then filed a writ with the California Court of Appeal.

In its Petition for Writ of Mandate, the Milwaukee Archdiocese presented a single issue to the California Court of Appeal: "The single issue presented in this petition is whether Paino met his burden of proof of establishing sufficient contacts between the Archdiocese of Milwaukee and California relating to the real party in interest's causes of action such that the Archdiocese of Milwaukee was subject to personal jurisdiction." *See* Real Party-In-Interest's Appendix, at A-1. The Archdiocese did not mention or present any issue relating to the First Amendment in its opening brief.[1]

Based on the facts discussed above, the Court of Appeal found that the Archdiocese purposefully availed itself of the jurisdiction of California, and therefore, was subject to

---

[1] The Milwaukee Archdiocese only mentioned the First Amendment in its reply brief in passing in a single footnote:

> Paino's attempts to bind the Archdiocese of Milwaukee to Widera's contacts with California . . . would require this Court to review and interpret Canon Law for the religious effect of incardination in the Roman Catholic Church. This Court is prohibited under the First Amendment from undertaking such an analysis. *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). This is [sic] no way prohibits the Court from determining whether personal jurisdiction exists in this case.

See Real Party-In-Interest's Appendix, at A-4 n.2.

the jurisdiction of California. *Id.* at 426. The California Supreme Court subsequently denied review of the California Court of Appeal decision.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Court of Appeal Did Not Make The Factual Findings Set Forth In Milwaukee's "Questions Presented."

In its Petition, the Milwaukee Archdiocese sets forth the following Questions Presented:

1. Does the First Amendment prohibit California from exercising specific personal jurisdiction over the Milwaukee Archdiocese *based solely on the Archdiocese's religious authority to deny Father Widera the right to employment by the Diocese of Orange*?

2. Does the Due Process Clause permit California to exercise specific personal jurisdiction over the Archdiocese of Milwaukee because *the Archdiocese failed to prevent or hinder Father Widera from accepting employment from the Diocese of Orange* where it was foreseeable that Father Widera might commit a specific type of tort while employed by the Diocese of Orange?

Thus, according to the Milwaukee Archdiocese's Questions Presented, the California Court of Appeal ruled that California could exercise jurisdiction over the Milwaukee

Archdiocese based solely on the fact that the Milwaukee Archdiocese had the religious authority to deny Father Widera the right to employment by the Diocese of Orange, but that the Milwaukee Archdiocese failed to prevent Father Widera from accepting that employment. These Questions Presented completely mischaracterize the findings by the Court of Appeal.

The Court of Appeal did not make any factual finding, or even discuss, the fact that the Archdiocese had the "religious authority to deny Father Widera the right to employment by the Diocese of Orange." Likewise, the Court of Appeal did not hold that the California courts could exercise jurisdiction over the Milwaukee Archdiocese because the Archdiocese "failed to prevent Father Widera from accepting employment from the Diocese of Orange." Instead, the Court of Appeal ruled that affirmative actions by the Archdiocese subjected it to California's jurisdiction:

> The evidence supports the conclusion the Milwaukee Archdiocese intentionally sent Widera to California to get him out of Wisconsin where he had been convicted of sexual perversion against a boy and could create further problems for the Milwaukee Archdiocese. . . . The evidence supported the conclusion the Milwaukee Archdiocese knew Widera was a pedophile and posed a serious threat of sexually abusing boys in California. By sending a known pedophile into California, the Milwaukee Archdiocese aimed its intentional conduct directly at this state. The brunt of the harm, indeed all of the harm,

> resulted in California. Having sent Widera into California knowing he was a convicted child abuser and a pedophile, the Milwaukee Archdiocese reasonably could expect to be haled into court in California to answer for the consequences of its actions.

Id. at 438. This Court cannot answer the Questions Presented by the Milwaukee Archdiocese. The Questions Presented are merely hypothetical questions because they are based on factual findings neither made nor relied upon by the Court of Appeal in ruling that California can exercise personal jurisdiction over the Milwaukee Archdiocese. A ruling on the Milwaukee Archdiocese's Questions Presented would only be an advisory opinion by this Court.

2. The Petitioner's Real Quibble Is That The Court Of Appeal Erred In Interpreting The Facts Of This Case.

The Milwaukee Archdiocese's real argument is that the Court of Appeal misinterpreted the facts in finding that the Milwaukee Archdiocese purposefully availed itself of California's jurisdiction. Throughout the Petition, the Milwaukee Archdiocese tries to argue that: (1) Milwaukee did not send Father Widera to California (Petition, p. 16); (2) Milwaukee did not direct Father Widera to travel to California (Petition, p. 25); (3) Milwaukee did not direct Father Widera to seek employment with the Diocese of Orange (Petition, p. 25); (4) Father Widera chose to seek employment with the Diocese of Orange (Petition, p. 25); (5) Widera chose California because he had family there (Petition, p. 16); and (6) Milwaukee only failed to prevent or hinder Father Widera

from accepting employment from the Diocese of Orange (Petition, p. 21).

As discussed above, the Court of Appeal made factual findings to the contrary:

> As part of his sentence for sexual perversion, Widera was ordered not to return to the Port Washington, Wisconsin area. Henke, the pastor of St. Andrew's Parish, wanted Widera removed. Concerns were raised over whether Widera could "in conscience" be reassigned within the Milwaukee Archdiocese "in view of Widera's record." A cover story was created: Widera would go " 'on vacation' " to California. In the ombudsman's notes, the words "on vacation" were set off by quotation marks. When asked why he was leaving, Widera was instructed to say "only that he's going on vacation." After going to California, Widera wrote: "It was on advice that I left the area."
>
> Once Widera was in California, the Milwaukee Archdiocese never recalled him, although it had the power to do so, never questioned him, never monitored his treatment, and never conducted an investigation to determine whether he continued to molest boys. The Milwaukee Archdiocese allowed Widera to be excardinated so he could be incardinated in the Orange Diocese. . . . [Thus,] the evidence

> supports the finding that the Milwaukee Archdiocese made and enacted a concerted plan to rid itself of Widera by intentionally placing him in California.

Id. at 439.

Rule 10 of the Rules of Supreme Court states that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule." This Court generally does not reexamine the state court's findings and conclusions of fact:

> No statute or rule governs our review of facts found by state courts [on direct review of state-court judgments]. The reasons justifying a deferential standard of review in other contexts, however, apply with equal force to our review of a state trial court's findings of fact made in connection with a federal constitutional claim. Our cases have indicated that, in the absence of exceptional circumstances, we would defer to the state-court factual findings, even when those findings relate to a constitutional issue. [citations omitted]. Moreover, "an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question.

Hernandez v. New York, 500 U.S. 352, 366 (1991) (citing *Miller v. Fenton*, 474 U.S. 104, 113 (1985)).

Here, the Court of Appeal's factual findings are clearly supported by the evidence that the Milwaukee Archdiocese sought to rid itself of Father Widera by sending him into California knowing he was a pedophile. Thus, even though the factual findings by the Court of Appeal relate to the constitutional issue of due process, this Court should defer to those Court of Appeal's findings.

What the Milwaukee Archdiocese really wants this Court to do is to overrule the Court of Appeal's factual findings, find that the Archdiocese was not complicit in transferring a known pedophile into California, and find instead that the only thing the Archdiocese did was fail to prevent Father Widera from accepting employment from the Diocese of Orange. Not only should this Court refuse to overrule the Court of Appeal's factual findings out of deference to that court, but also because the evidence does not even support those conclusions.

3. Neither The Decision Nor The Record Below Raises The First Question Presented In the Petition.

The Milwaukee's first Question Presented is whether "the Free Exercise Clause of the First Amendment prohibits a state from exercising specific personal jurisdiction over a non-resident religious organization based solely on its religious authority to deny its clergy the right to employment by a separate religious organization residing in the state."

The Court of Appeal did not decide that question in this proceeding. In fact, nowhere does the Court of Appeal address any First Amendment argument.

The Milwaukee Archdiocese says in its Petition that it argued before the Court of Appeal that "its religious authority over Widera could not provide California with a basis for the exercise of jurisdiction consistent with the First Amendment," but that the Court of Appeal ignored this argument. Petition, p. 18, n.8. This just is not true. The Milwaukee Archdiocese did not present any issue relating to the First Amendment in its opening brief, and only mentioned the First Amendment in passing in a single footnote in its reply brief. *See* Real Party-In-Interest's Appendix, at A-1 & A-2.

The Milwaukee Archdiocese bears the burden of establishing affirmatively that it properly presented the First Amendment issue in the state courts. *See e.g., Adams v. Robertson*, 520 U.S. 83, 88-89 & n.3 (1997) (to obtain review of a state court decision, the petitioner must specifically set up or claim a federal right, in a proper manner, in accordance with the applicable state procedural law; "passing invocations" are insufficient); *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 n.9 (1987) (a casual reference to a federal case is insufficient to inform a state court that it has been presented with a federal claim).

In California, "[a] party's failure to raise an issue below and in its opening brief constitutes a waiver." *Nemarnik v. Los Angeles Kings Hockey Club*, 103 Cal. App. 4th 631, 638 n. 3, 127 Cal. Rptr. 2d 10 (2002); *Tiernan v. Trustees of Cal. State University & Colleges*, 33 Cal. 3d 211, 216 n. 4, 188 Cal. Rptr. 115 (1982) (failure to raise issue on

appeal constitutes waiver); *Locke v. Warner Bros., Inc.*, 57 Cal. App. 4th 354, 368, 66 Cal. Rptr. 2d 921 (1997) (failure to raise issue in opening brief waives issue on appeal, even if raised in the reply brief).

The Archdiocese failed to meet its burden of showing that the First Amendment issue was properly presented to the California Court of Appeal. Therefore, this Court should decline to consider that Question Presented.

Moreover, contrary to what the Milwaukee Archdiocese now argues, a civil court can independently examine the structure and operation of a religious entity in ruling on a personal jurisdiction issue without violating the First Amendment. *General Council v. Superior Court of California*, 439 U.S. 1355, 1356, 99 S. Ct. 35, 26 (1978). In *General Council*, several retirement home residents filed a class action suit in California involving the financial collapse of Pacific Homes, Inc., the operator of the retirement homes. The residents sued a United Methodist Church organization, alleging that Pacific Homes was the alter ego, agency, or instrumentality of the that religious organization. The Methodist organization moved to quash the service of the complaint, arguing that California could not exercise personal jurisdiction over it.

In a request for stay, the Methodist organization argued to the United States Supreme Court that the lower court violated its First Amendment rights in basing its assertion of jurisdiction on the residents' characterization of the organization's role in the structure of the United Methodist Church, and rejecting contrary testimony of church officials and experts and statements set forth in the Book of

Discipline. *General Council*, 439 U.S. at 1370. Justice Rehnquist rejected this argument *in dicta*:

> In my view, [the Methodist organization] plainly is wrong when it asserts that the First and Fourteenth Amendments prevent a civil court from independently examining, and making the ultimate decision regarding, the structure and actual operation of a hierarchical church and its constituent units in an action such as this. There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes. [citations omitted]. But this Court never has suggested that those constraints similarly apply outside the context of such intraorganization disputes.

General Council, 439 U.S. at 1372-73. Thus, the civil court in this case was permitted to look to the Catholic church organization and structure to determine this personal jurisdiction issue.

Additionally, the Milwaukee Archdiocese should be estopped from even raising a First Amendment argument in light of the fact that the Milwaukee Archdiocese itself relied on canon law to try to argue that it had no contact with the State of California. For example, the Milwaukee Archdiocese argued that "Under canon law, priests cannot be incardinated in two dioceses at the same time. Therefore, the proper canonical process was undertaken to effect this transfer of incardination." *See* Real Party-In-Interest's Appendix, at A-

2. The Milwaukee Archdiocese should not be permitted to argue on one had that the Court of Appeal cannot review or interpret canon law to determine the structure and actual operation of the church, and then use canon law to support its position.

4. The Decision By The California Court Of Appeal Is Consistent With The Decisions Of This And Other Courts.

Personal jurisdiction questions generally tend to depend on the particular facts of each case. *General Council v. Superior Court of California*, 439 U.S. 1355, 1373, 99 S. Ct. 35, 39 (1978). As stated by Justice Rehnquist, "only a marked departure by a lower court in the application of established law would persuade four Justices to grant certiorari." *Id.*

In this case, the Court of Appeal wrote a 20 page published opinion. The Court of Appeal spent a great deal of time outlining all of the facts showing the Archdiocese's contacts with California, demonstrating how the Archdiocese engaged in intentional conduct expressly aimed at California, and showing just how the Archdiocese knew its conduct would cause harm in this state. There is no indication in this case that the Court of Appeal failed to apply the due process standards enunciated in this Court's decisions.

The Milwaukee Archdiocese tries to argue that the Court of Appeal distorted the "effects" test set forth by this Court in *Calder v. Jones*, 465 U.S. 783 (1984). The Archdiocese says that the Court of Appeal improperly used the "effects" test by finding that the Archdiocese's conduct --

failing to prevent Father Widera from being employed by the Orange Diocese and failing to take action to prevent possible future harm – was expressly aimed at or targeted California. Petition, p. 5.

Contrary to what the Archdiocese tries to say, the Court of Appeal did properly apply this Court's "effects" test.

> Under the "effects" test for determining purposeful availment, a defendant might be subject to jurisdiction in the forum state if the defendant engaged in intentional conduct "*expressly aimed at or targeting* the forum state," and the defendant knew the intentional conduct would cause harm in the forum.

Milwaukee, 112 Cal. App. 4th at 436 (citing *Pavlovich v. Superior Court*, 29 Cal. 4th 262, 127 Cal. Rtpr. 2d 329 (2002)). The Court of Appeal went on to discuss the "effects" test:

> The *Pavlovich* court recognized the lack of uniformity in applying the *Calder* test. [citation omitted]. In particular, the *Pavlovich* court acknowledged that courts have struggled over whether *Calder* stands for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction. . . . The *Pavlovich* court reviewed federal and out-of-state cases and concluded, "virtually every jurisdiction has held that the *Calder* effects test requires intentional conduct *expressly*

> *aimed at or targeting* the forum state in addition to the defendant's knowledge that his intentional conduct would cause harm in the forum." [citation omitted]. The *Pavlovich* court "join[ed] with those jurisdictions that require additional evidence of express aiming or intentional targeting."

Milwaukee, 112 Cal. App. 4th at 437-38. The Court of Appeal went on to apply the test enunciated in *Pavlovich* by holding that the Milwaukee Archdiocese engage in intentional conduct expressly aimed at or targeting California, knowing the intentional conduct would cause harm in this state. "The evidence supports the conclusion the Milwaukee Archdiocese intentionally sent Widera to California to get him out of Wisconsin where he had been convicted of sexual perversion against a boy and could create further problems for the Milwaukee Archdiocese." *Id.* at 438.

Moreover, the Court of Appeals held that the Archdiocese knew that its conduct in sending this known pedophile into California would harm California residents:

> The nature of the Milwaukee Archdiocese's conduct--sending a pedophile priest directly into California--meant the Milwaukee Archdiocese's conduct *would* harm California residents. In other words, the Milwaukee Archdiocese's conduct targeted a known group of California residents--boys, specifically, Roman Catholic boys-- as a means of getting

> Widera out of the Milwaukee Archdiocese. Such targeting is, we believe, sufficiently individualized to satisfy due process because the Milwaukee Archdiocese could reasonably anticipate being haled into court in California.

Id. at 440. This holding falls squarely within this Court's "effects" test set forth in *Calder.*

The Court of Appeal's decision is also consistent with cases from other states in which out-of-state dioceses intentionally transferred molesters into the forum states. For example, in *John Does 1-9 v. CompCare, Inc.*, 52 Wash. App. 688, 697-98, 763 P. 2d 1237 (1988), a Washington court found in personam jurisdiction over an out-of-state diocese for moving a known pedophile priest into the State of Washington. That court found personal jurisdiction based on the facts that the out of state diocese ordered the priest to leave the geographical area of the out-of-state diocese because of molestations; the out-of-state diocese approved the decision that the priest would reside in Washington; the out-of-state diocese placed the priest in a Jesuit House where he could be in an atmosphere that would either support him or keep him from being involved with young people; and the out-of-state diocese maintained the priest in Washington because of his pedopiliac problem. The court held that the out-of-state diocese purposefully availed itself of the privilege of conducting activities within Washington. *Id.* at 698-99.

Similarly, in *Doe 1-22 v. Roman Catholic Bishop of Fall River*, 509 N.W. 2d 598, 600 (Minn. 1993), a Minnesota court held that minimum contacts were present when an out-of-state diocese authorized an intermediary to assign a priest

to parish work in the forum state even though the out-of-state diocese was aware of the priest's pedophilia.

As seen by these cases, forum states have exercised jurisdiction over out-of-state dioceses which send molesting priests into the forum states.

The Milwaukee Archdiocese pointed to another sister state case where that court refused to exercise jurisdiction over an out of state diocese, the case of *Doe v. Roman Catholic Diocese of Boise, Inc.*, 121 N.M. 738 (Ct.App.New Mexico 1996)). However, as stated by the California Court of Appeal, the out of state diocese in that case "played no part in the priest's decision to settle in New Mexico, but only granted the priest permission to leave Idaho." As the Court of Appeal noted,

> Here, in stark contrast, the Milwaukee Archdiocese did not merely approve a request to work outside the Milwaukee Archdiocese or acquiesce in Widera's move. Rather, the evidence supports the finding the Milwaukee Archdiocese sought to rid itself of Widera by intentionally sending him into California.

Milwaukee, 112 Cal. App. 4th at 440-41.

In conclusion, the Court of Appeal decision comports with the laws of this Court and other states as well.

CONCLUSION

No reason exists why the Milwaukee Archdiocese's Petition for Writ of Certiorari should be granted. For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 19th day of May, 2004.

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APPENDIX

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B. Excerpts from pages 13 - 15 of Petitioner's Reply To Real Party-In-Interest's Opposition to Petition for Peremptory Writ of Mandate filed by the Archdiocese of Milwaukee Before the California Court of Appeal ..... A-2 thru A-4

have such systematic and continuous contacts with California such that it was subject to general jurisdiction in California (PA 01082). Nonetheless, the respondent court denied the Archdiocese of Milwaukee's motion to quash. The respondent court did not city any factual basis to support a finding that the Archdiocese of Milwaukee had any contacts with the State of California, much less sufficient contracts relating to real party in interests's claims, such that the Archdiocese of Milwaukee was subject to the specific jurisdiction of the court for this particular case. (PA 01083-1095).

Basis for Writ Relief

10. The single issue presented in this petition is whether Paino met his burden of proof of establishing sufficient contacts between the Archdiocese of Milwaukee and California relating to the real party in interest's causes of action such that the Archdiocese of Milwaukee was subject to personal jurisdiction.

11. With all due respect to the respondent court, the Archdiocese of Milwaukee contends that this burden was not met for the reasons previously described and for the reasons more fully described below.

Wisconsin and located in Milwaukee, Wisconsin. (PA00003). It is a separate and distinct religious incorporated entity from the Roman Catholic Bishop of Orange ("Diocese of Orange"), which is a religious corporation organized under the laws of California. The Archdiocese of Milwaukee is presided over by a different bishop or archbishop than the Roman Catholic bishop of Orange. The Archbishop of Milwaukee exercises no control or influence over the activities of the Diocese of Orange. (PA 00061-62 at ¶¶ 2-3).

In October of 1981, the Diocese of Orange informed the Archdiocese of Milwaukee that Widera was seeking to be incardinated into the Diocese of Orange. The Diocese of Orange had approved this request. Under Canon Law, priests cannot be incardinated in two dioceses at the same time. Therefore, the proper canonical process was undertaken to effect this transfer of incardination. Once a priest is incardinated in a new diocese, all of his relationships, obligations and connections with the former diocese cease. Four years before the alleged abuse, Widera had severed all canonical or other connections with the Archdiocese of Milwaukee. The Archdiocese of Milwaukee had no control

over or obligation concerning Widera in any respect. (PA 00063 at ¶ 9).

The relevant period during which the minimum contact analysis must occur is when the cause of action arose rather than when the complaint was filed or served. Boaz v. Boyle & Co., 40 Cal. App. 4th 700, 717 (1995). Paino cannot point to any contacts by the Archdiocese of Milwaukee in 1985, when the alleged abuse occurred - - in fact, Paino's opposition brief does not include a single contact at all by the Archdiocese of Milwaukee with California for any time from 1982 to 1985, and virtually none before that. (See pg. 21, infra).

Any revocation of Widera's faculties to act as a priest in California must come from the Diocese of Orange, not the Archdiocese of Milwaukee (PA 00966). The Archdiocese of Milwaukee did not have the ecclesiastical authority to control Widera's priestly activities in California. Further, Widera's temporal needs were provided by the Diocese of Orange. As these temporal needs were met, the Archbishop from Milwaukee had no further duties to Widera while he was in

California, even while he was incardinated[2] with the Archdiocese of Milwaukee. (PA 00952-954 at 35:20-25, 36:1, 41:22-25, 42:1-4).

5. The Archdiocese of Milwaukee did not Have Jurisdiction, Control and Authority Over Widera While he was in California.

Paino's record citations that the Archdiocese of Milwaukee had "jurisdiction, control and authority" over Widera while he was in California are misleading and lack candor. Paino ignores the following record citations:

1. The Diocese of Orange admitted that the authority of a spiritual leader of one diocese is limited to its territorial boundaries. (PA 00930 at 39:22-25; 40:1-8).

2

Paino's attempts to bind the Archdiocese of Milwaukee to Widera's contacts with California are inappropriate. It would require this Court to review and interpret Canon Law for the religious effect of incardination in the Roman Catholic Church. This Court is prohibited under the First Amended from undertaking such an analysis. Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). This is no way prohibits the Court from determining whether personal jurisdiction exists in this case. The Court should review the Archdiocese of Milwaukee's contacts with California, not the religious significance of incardination. In any event, Widera was excardinated many years before the alleged abuse at issue.